DOCUMENT RESUME

ED 244 280 CS 208 323

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TITLE Reinforcing Consent as a "Private Facts" Defense.
PUB DATE 6 Aug 84
NOTE 22p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (67th, Gainesville, FL August 5-8, 1984).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation; *Journalism; Laws; Legal Problems; *Legal Responsibility; *Mass Media; Media Research; *Privacy
IDENTIFIERS *Consent (Publishing)

ABSTRACT

To delineate the ideas of newsworthiness and consent as they apply to journalism and private facts lawsuits (those in which plaintiffs seek to stop publication of facts about themselves), this paper covers key areas of dispute. Various sections of the paper discuss (1) the definition of newsworthiness, (2) consent as a legal defense, (3) the problem of reneging sources, (4) promissory estoppel, or binding gratuitous promise, and (5) justified revocation of promise in cases of misleading general publication. It examines the test case "Virgil v. Time, Inc.," in which the plaintiff sued to stop publication of facts he had previously consented to release, and points out that several judgments made in favor of the journalistic community, including the Virgil case, rest on a tenuous and misleading definition of newsworthiness as an issue dependent on the state of community mores, rather than one refined daily by application. Writers and editors are cautioned to examine their position when publishing personal facts about public figures or private individuals and to be aware of their legal position and rights concerning newsworthiness and consent. (CRH)

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REINFORCING CONSENT AS A "PRIVATE FACTS" DEFENSE

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REINFORCING CONSENT AS A "PRIVATE FACTS" DEFENSE

Introduction

Newsworthiness and consent have been the premier defenses in "private facts" invasion of privacy litigation in America.[1] While First Amendment implications have enhanced newsworthiness as a defense, newsworthiness can nevertheless be a hazardous defense. The reason: it is courts--lawyer-judges, or juries instructed by lawyer-judges--which ultimately define newsworthiness and apply that definition to the circumstances of the controversy. It is not journalists, who have daily refined a definition through repeated application, who determine newsworthiness.

Recent decisions in both defamation and privacy law reflect a narrowing of the judicial definition of both the "public figure" and newsworthiness concepts.[2] Among the developments causing concern to the communications media has been the judicial determination that events may lose aspects of their newsworthiness through the passage of time.[3] Thus, a noncontemporaneous recounting of the misdeeds and foibles of the people involved in those events can be a tortious invasion of privacy.

This suggests that, after examining some of the current problems connected with newsworthiness as a "private facts" defense, consent should be examined more closely as a sometimes neglected alternative defense--particularly when reporters and feature writers have turned to newsworthiness when faced with

the almost inevitable problem of revoked consent or the reneging source.

Newsworthiness: Ambiguities and Limitations

The irritant which led to publication of the now-famous Harvard Law Review article from which American privacy law stems in great degree was for many years generally considered to be the dissemination of "private facts," particularly about author Samuel Warren's family. Yet after analyzing the Boston newspapers for the period during which Warren and Brandeis wrote, Don Pember concluded that

> (t)he examination failed to uncover . . . any instances in which the press was "overstepping in every direction the obvious bounds of propriety and decency." It did not appear that gossip had become a trade "pursued with industry as well as effrontery," and there was no evidence that the "details of sexual relations are spread broadcast in the columns of the daily papers."[4]

This finding indicates a significant difference in the news judgment of two prominent lawyers and the editors of their era. It might also suggest to us today that a similar divergence in viewpoint may still exist today. Perhaps by the nature of their training and background, lawyers and journalists may be pulled in different directions when making news judgments and even when attempting a practical definition of news itself.

For journalists, this divergence poses a problem: when newsworthiness is a critical issue in litigation, it will be lawyer-judges who formulate the definitions of news and newsworthiness, and who apply those definitions to situations involving journalist defendants.

Nonetheless, there is broad descriptive language in authoritative legal treatises which deal with the issues of newsworthiness and reasonable interest in the activities of public figures (the latter to be distinguished from the "public figure" of defamation law). For example, the Restatement of Torts, Second, states:

> Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of community life of which he is a part. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action. . . . It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.[5]

But an exhaustive compilation of cases[6] relating to a determination of public interest or newsworthiness has produced judicial language which should serve as a caution to journalists. We are warned, for instance, that "Public or general interest is not to be confused with mere curiosity,"[7] that "discrete events of current interest are entitled to the protection of newsworthiness" (emphasis added)[8] and that "Current events may or may not be of public interest; the nature of the event and the identity of the parties involved may be controlling factors."[9]

Moreover, a line of cases[10] in California, a leader in the continuing development of privacy law because it is a major media base, has provided a set of fairly restrictive principles to be considered in determining newsworthiness. They are:

1. The social value of the facts published.

2. The depth of the article's intrusion into ostensibly private affairs.

3. The extent to which the party voluntarily acceded to a position of public notoriety.

Working journalists, imbued with a newsroom-fostered "feeling" for news

and pressured by deadlines, could have more than a little difficulty assimilating those principles into their daily routine. A more recent California case has not helped. It has added this language:

> Among the factors to consider are /also/ . . . the exact nature of the state's interest in preventing the disclosure, and whether the information is a matter of public record. Additionally, we look to any continued public interest in the event so that the passage of time does not per se extinguish the privilege of the publisher; if a report made reasonably contemporaneously with the incident would have been in the public interest, the weighing process continues in light of the circumstances prevailing at the time of publication.[11]

In the widely publicized Briscoe case,[12] a magazine article on truck hijacking recalled the plaintiff's role in an incident 11 years earlier. The plaintiff alleged that he had paid his debt to society, was completely rehabilitated and was a respectable family man, so that the recounting of his wrongdoing caused serious emotional harm to him and his family and threatened his continued role as effective supporter of that family. The "state interest" here was the successful rehabilitation of a convicted felon and his continued ability to support himself and his family without public assistance.

With regard to the public record status of the allegedly intrusive information, it is germane to note that many states today have provisions for either sealing or expunging the records of criminal convictions when the individuals involved have successfully completed probation or have served the prison sentence imposed.

The more ominous aspect of Briscoe, however, is the time limit it would inject into the concept of newsworthiness. The court did cite the First Amendment in acknowledging that the facts of the plaintiff's criminal past could be recounted as constitutionally protected communication. But, it said, the identity of the "actor" is information which serves little independent public

purpose and cannot therefore claim protection.

Fortunately, the California rule has been specifically rejected subsequently in at least one other state. The Kansas Supreme Court said it found another line of cases much more compelling when it held that the passage of time does not destroy newsworthiness. It said:

> The purpose of the tort is to protect an individual against unwarranted publication of private facts. Once facts become public, the right of privacy ceases. We do not see how public facts, once fully exposed to the public view, can ever become private again. We cannot conceive, for example, that any of the participants in the recent "Watergate" scandal can ever acquire a cause of action for invasion of privacy based on a retelling of that story.[13]

Other courts, which may look to the Restatement for guidance in view of this disagreement, will find ambivalence:

> (L)apse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by the revelation of a past that he has put behind him. Again the question is to be determined upon the basis of community standards and mores. Although lapse of time may not impair the authority to give publicity to a public record, the pointing out of the present location and identity of the individual raises a quite different problem.[14]

As a final note on newsworthiness in California, a Court of Appeal early last year remanded for jury determination a newsworthiness-or-private facts question, rejecting the newspaper defendant's contention that the personal background--here, a sex change--was newsworthy as a matter of law because the plaintiff was a public figure. The appellate court rejected the newspaper's claim of First Amendment protection.[15]

Consent: Help from Contract Law

If newsworthiness has inherent, and perhaps growing weaknesses, consent

clearly becomes more important as a defense in "private facts" cases. The two defenses are not unrelated, of course. Privacy public figures are commonly described as having implied their consent to publication of facts related not only to their public activities but to at least some non-public or quasi-private activities as well. This implied consent is commonly referred to as a waiver or relinquishment of the right to privacy. Consent can be implied voluntarily when individuals deliberately engage in activities of direct concern or interest to the public, or involuntarily when they are mere victims of crimes and catastrophes, for instance.[16]

The farther one moves from activities undertaken, or suffered, in the public eye, however, the less likely it becomes that implied consent or waiver will be found. Then explicit consent is essential. In other words, the more private the "private facts," the more important it is that explicit consent be obtained.

Explicit or express consent will stand as a defense whether there has been consideration given for the consent or not and whether the consent is parol or written.[17]

The rationale for consent as a defense under these circumstances is obvious: those who have voluntarily revealed personal information about themselves cannot reasonably or justly complain that the one to whom the facts were revealed under non-confidential circumstances has revealed those facts to others, particularly when the wider revelation was easily foreseeable.

The Problem of the "Reneging Source"

Journalists routinely work in gratuitous consent situations. A reporter interviews a subject; the subject, knowing that the reporter plans to write a

report based on the interview and knowing that the report will be widely disseminated, conveys personal information to the reporter; therefore the interviewee is subsequently precluded from complaining when the personal facts revealed in the interview are made known to the public through a news report or feature article distributed by a mass medium.

In covering breaking news, the brief period between interview and dissemination to the public virtually precludes any dispute over consent--at least until after publication, when reporters have occasionally been accused of violating confidences. The very nature of news requires such a straightforward arrangement. Moreover, there has been no serious challenge to the fairness of this manner of dealing.

In the areas of indepth news and feature writing, however, the time element typically differs. Journalists may work on aspects of a complex story for weeks, months or even years. The interval between an interview involving the revelation of personal facts and publication of the article containing these facts is thus much greater, providing interviewees time to reconsider the revelations and to wish they had not provided the personal information.

The legal issue posed by the interviewee who wants to revoke consent--the "reneging source"--to the use of personal information is this: Can consent, for which there has been nc consideration (in the technical meaning of that term), be revoked at any time before the personal facts involved are disseminated to the public?

Among reported "private facts" privacy decisions, the 1976 case of Virgil v. Time, Inc.,[18] dealt with this issue, but unsatisfactorily. Moreover, the eventual ruling in Virgil came on the ground of newsworthiness, whose tenuousness as a defense has already been examined. Thus, Virgil is of little or no

value as a precedent on the question of revocability of gratuitous consent in the publication of private facts.

Because of its interesting background, the Virgil case was fairly well publicized when it was in the courts. A member of the staff of Sports Illustrated, Thomas Curry Kirkpatrick, persuaded his editors to approve his working on an article about body surfing in Southern California. Kirkpatrick focused on a public beach, the Wedge, near Newport Beach, since it was reputed to be the most dangerous area frequented by dedicated surfers. Kirkpatrick was directed by other surfers to Michael S. Virgil, known as "the most daredevil of them all" by Wedge frequenters. Kirkpatrick interviewed Virgil extensively, and much of the material from these interviews was included in a 7,000-word article which appeared in Sports Illustrated about a year and a half after Kirkpatrick first began work on the project. Virgil was also featured in photographs commissioned for use with Kirkpatrick's article.

After Kirkpatrick had written his story, an editorial assistant telephoned Virgil to check the accuracy of material relating to him. It was then that Virgil indicated he was having second thoughts about publication of the personal background he had provided Kirkpatrick. That background included "some rather bizarre incidents in his life that were not directly related to surfing."[19] As Judge Merrill noted in the Court of Appeals opinion, these included Virgil's extinguishing a lighted cigarette in his mouth, burning a hole in a dollar bill while it rested on the back of his hand, diving headfirst down a flight of stairs, diving off billboards, dropping loads of lumber on himself, etc. Despite the eccentricity of these actions, Judge George Thompson Jr., in the dispositive District Court ruling, said the anecdotes recounting Virgil's escapades conveyed "nearly as strong a positive image as they do a negative one," adding:

> On the one hand, Mr. Virgil can be seen as a juvenile exhibitionist, but on the other hand he also comes across as the tough, aggressive maverick, an archetypal character occupying a respected place in the American consciousness.[20]

Although Virgil expressed opposition to the use of the personal facts about him, the story was published, with its final two pages devoted primarily to Virgil and his exploits. Virgil subsequently filed suit against Time, Inc., publisher of Sports Illustrated. Time moved for summary judgment, which was denied. Time appealed to the Court of Appeals for the Ninth Circuit, which brushed aside the defense of consent and directed the District Court on remand to consider instead the defense of newsworthiness. Time sought a writ of certiorari for review by the Supreme Court of the United States, but certiorari was denied. Back in the District Court, newsworthiness was found to preclude recovery by Virgil,' In citing Virgil, subsequent cases have referred to the newsworthiness defense[21] or Virgil's impact on the use of summary judgment.[22] None has re-examined the revocability of consent question.

Thus, the courts have passed over, it seems, the affront to fairness posed by the reneging source--the person who would kill a story after substantial time, effort and expense have gone into preparing it for publication. The Court of Appeal in Virgil, and subsequent case law, seems to have given this aspect lamentably insufficient consideration. Citing the Restatement of Torts, Second, the Virgil court distinguished between Virgil's "publication" of private facts when he related them to Kirkpatrick, and the "publicity" which occurred when the facts appeared on the pages of Sports Illustrated. The private facts were thus not "made public" when Kirkpatrick obtained them, the court said, because

> (t)alking freely to a member of the press, knowing the listener to be a member of the press, is not then in itself making public.

> Such communication can be said to anticipate that what is said will be made public since making public is the function of the press, and accordingly such communication can be construed as a consent to publicize. Thus if publicity results it can be said to have been consented to. However, if consent is withdrawn prior to the act of publicizing, the consequent publicity is without consent.[23]

In this way the court apparently created--although, it could be argued, with strained artificiality--some breathing space period during which a Virgil could lawfully revoke consent. The court relegated to a footnote this additional comment:

> There may be cases where requiring an eleventh-hour change of mind to be honored would unfairly burden the publisher and where it could not, for that reason, be regarded as a timely revocation of consent. This is not such a case.[24]

With that final cryptic six-word sentence, the Virgil decision avoided all consideration of an area of equity jurisprudence which offers writers, and publishers, a fairer shake in dealing with the reneging source, however. It has been developed in contract law, but it is contract law principles which are cited when questions of consent arise in right of privacy litigation.

Promissory Estoppel

Contract law makes it clear that for a promise (in the Virgil context, a consent) to be binding, consideration must be given for that promise.[25] A gratuitous (no consideration) promise is not binding and may be revoked at any time. Based as it is on a natural sense of justice, this makes sense to the lay person as well as the legal scholar.[26]

But when a gratuitous promise is made and the person to whom it is made undertakes a project involving substantial risk, expense or effort in reliance on the promise, revocation of the promise at this point seems a betrayal--again, in terms of natural justice.

Perhaps because consistent, well-defined principles are necessary by the very nature of contract law, the common law was reluctant to make any exceptions to the requirement of consideration. So the concept of estoppel came into the picture from the equity courts to deal with misleading conduct. It held that a person cannot make an affirmation or denial now which contradicts an earlier affirmation or denial upon which someone has relied to his detriment.[27] As one reference puts it,

> Whether an estoppel can be a substitute for consideration has been a disputed question in the courts generally. It is a classic concept that a promise and the consideration must purport to be the motive for each other, in whole or at least in part, and that it is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting. From this classic concept of consideration, the doctrine of promissory estoppel is a departure. (Footnotes omitted)[28]

Promissory estoppel holds specifically that a promise is binding if the person to whom the promise was made (promisee) "has suffered some detriment in reliance thereon, even though such detriment was not requested as consideration."[29] If these circumstances exist, consideration is not necessary to bind the person who made the promise (promisor) to the terms of the promise.[30]

As another authority puts it:

> (F)or the doctrine of promissory estoppel to apply, the promise which is sought to be enforced must have induced action of a definite and substantial character by the promisee. Also, justifiable reliance and irreparable detriment to the promisee are necessary factors to enable him to invoke the doctrine of promissory estoppel. Generally speaking, the mere fact that a promisee relies upon a promise made without consideration does not impart validity to what was before void. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the contract, either impliedly or in terms, as the conventional inducement, motive, and equivalent of the promise. (Footnotes omitted)[31]

Applying these principles to the Virgil facts, it seems clear that once the promise--i.e., the consent to be interviewed and to have the interview data used in a Sports Illustrated article--had been made, Kirkpatrick and his maga-

zine suffered a "detriment" when they expended time, effort and money in developing their story. They spent months on researching, writing, editing, checking, illustrating, typesetting and laying out the article on the Wedge and its best-known surfer. Therefore, under the principles of promissory estoppel, Virgil should have been bound by his promise (consent) and should have been shorn of any right to revoke it.

While it might be objected that an affluent conglomerate like Time, Inc., would hardly have suffered literally irreparable damage if it had to rework the surfing story, the publisher would certainly have suffered substantial damage which would be "irreparable" in a non-monetary sense: the edge would be off the surfing article and the insight into what kind of a person achieves fame as a daredevil surfer would be forever missing from Kirkpatrick's account. Change the circumstances to those of a small publication which is only marginally successful, or to the plight of a full-time freelancer who has invested months on a major article and irreparability is incontrovertible from a monetary standpoint as well.

An authoritative treatise, Williston on Contracts, cites an early Pennsylvania decision which offers something of a parallel. There consent by a landowner to diversion of a watercourse could not be revoked after the promisee made improvements and invested capital in consequence of the promise.[32] Williston adds:

> It should be noticed that no slight acts or merely technical reliance will serve, (but) (t)here is discernible in the decisions in cases of hardship an undercurrent of impatience with the requirement /of consideration/ and an effort to enlarge the boundaries of enforceable promises. The binding thread in all the classes of cases which have been enumerated is the justifiable reliance of the promisee and the hardship involved in refusal to enforce the promise.[33]

Justified Revocation

In dealing with the specific issue of revocability of consent in privacy cases, however, another legal reference states flatly:

> Consent to publication concerning an individual, once given, apparently may be revoked, and one publishing facts about an individual after such revocation has been found guilty of an invasion of privacy.[34]

By itself, this authority would seem to justify the peremptory treatment afforded revocation in the Virgil case and impair the entire theory of promissory estoppel in the instance of the reneging source. But an examination of the cases cited by this authority as the basis for its statement of the law is instructive. In one case cited, Schwartz v. Edrington,[35] the plaintiffs sought to enjoin publication of their names as signers of a petition seeking incorporation of a village after they had changed their minds about supporting the petition. In State ex rel. LaFollette v. Hinkle,[36] a presidential candidate sued to keep a state political organization from using his name after having given permission earlier, the change of mind presumably resulting from a subsequent disagreement over policy or philosophy.

In neither of these cases were journalists or media involved, it should be noted, nor did the cases involve private facts. General publication ("publicity," as the Virgil court called it) was not an issue. The plaintiffs in both cases were attempting to block misleading communication--the petition signers the use of their names as supporters of the incorporation, Senator LaFollette the linking of his name with a political group with which he disagreed. Thus both cases are substantially distinguishable from the Virgil setting, which involved general dissemination of allegedly private but admittedly accurate, non-misleading information for which consent to disseminate had been given.

In arguing for revocability of gratuitous promises, and therefore in effect against promissory estoppel, another commentary[37] cites Garden v. Parfumerie Rigaud, Inc.[38] Unlike most of the other promissory estoppel cases referred to in the texts and treatises, this one involves privacy, albeit appropriation of personality or "right of publicity" privacy. The plaintiff gave her written consent to the use of her name and portrait in connection with a perfume developed and marketed by the defendant. Considerable money was invested in trademarking and promoting the product. Then the plaintiff attempted to revoke her permission for the use of her name and likeness. The court said:

> The court cannot lend itself to defendant's claim that, having trademarked the article and invested considerable money to popularize it, no revocation is now possible. It may well be that by revocation serious impairment of business results. But that is a danger and risk assumed in accepting a concept unlimited as to time and against which, in the beginning, guard could easily be had. Regardless of plaintiff's reason for her refusal to continue permission to use her name, and even admitting that her reason is ulterior and mercenary, it cannot be denied that her name and her portrait are her own and during life solely at her disposal.[39]

Here too are significant differences from the Virgil situation, making it highly inappropriate to use Garden to argue against promissory estoppel in the standard news and feature situation involving the reneging source. While courts repeatedly say they will not come to the aid of a party who has made a bad bargain, they do--and Garden demonstrates this. The actress was obviously improvident in giving away the use of her name and image, so the court sympathetically extended a helping hand. Rigaud was not totally wronged by the decision either, of course. While the company had put money into the perfume, it had profited from the venture (else why would Garden have initiated the litigation?) without paying for a valuable ingredient in

its succes: use of the Garden name.

In Virgil, no endorsement or testimonial exploitation of the plaintiff's name was involved. Use of the plaintiff's name was at issue only in connection with the allegedly private facts connected with it. Moreover, use of the name and the facts associated with the name was a single event which occurred with publication of the article on surfing. It was not a continuing use like that which occurs in a long-term marketing program.

Summary

On remand to the District Court, the Virgil case was ultimately decided on the basis of the character of the facts published about the plaintiff rather than on the existence of consent to publish those facts. Judge Thompson found that Virgil's non-surfing activities were newsworthy. He ruled further that the defense of newsworthiness was not lost on the ground that the facts revealed were so "morbid and sensational" as to offend community standards of decency.

While this final result may have brought a collective sigh of relief from the journalistic community, the several years since the decision was announced cannot dissipate the nagging apprehension that stems from a decision made on shaky grounds while giving short shrift to a broader, more basic issue. Judge Thompson himself wrote that "newsworthiness is an issue dependent on the present state of community mores," echoing the Restatement of Torts, Second, which had been cited by the Court of Appeals in sending the case back to him.[40] Others have pointed to the tenuousness and subjectivity of a newsworthiness concept based on community mores.[41]

It is certainly conceivable that a court could have decided that the juvenile exhibitionism of a person who later body surfs at a public beach is not newsworthy. Surely it was a matter of individual judgment to include all

of the details of Virgil's past in the final two pages of the Kirkpatrick article. Is it inconceivable that some editors might have cut all or part of this material? The differences between writers and editors on such issues are common as well as well nigh universal.

But editors usually share some community of perspective with writers. Judge Thompson said he had been directed to determine whether Virgil's indenty was necessary for the surfing story and whether the public had a legitimate interest in that identity. He wrote: "There seems to have been no compelling reason to use Mike Virgil's true identity in the article, but this would seem to be the case whenever the person involved is not a public figure." That hardly seems to be the viewpoint of a journalist.

The conclusion seems unavoidable: If there is a sounder defense than newsworthiness in a lawsuit brought by a reneging source, it ought to be pressed. Consent, unrevocable under the principle of promissory estoppel, is such a defense.

Personal facts have long been the quarry of feature writers, particularly those producing biographical profiles, and the pursuit of such information is certainly not always or necessarily tainted by gossip-mongering or voyeurism. Such facts more often humanize current events by fleshing out the figures who make or are involved in the news. Even names in history become more real if their biographers provide a "warts and all" picture of them.

But in collecting personal facts, particularly about people who are not public leaders, reporters and writers will inevitably encounter sources who have second thoughts about what they have revealed about themselves. These misgivings will naturally lead to requests that certain facts be withheld from publication--in essence, a revocation of the consent to publish personal facts

implicitly provided when the source agreed to be interviewed and answered questions during the interview.

Given the common circumstances of publishing, a great deal of time and effort will customarily have been expended on the article containing personal facts when the attempt to revoke consent is made. It would be unjust to give the reneging source the power of a last-minute absolute veto over publication, particularly when that source provided the facts knowingly and voluntarily, fully able at the tine to appraise the consequences of publication.

Since consent is a premier defense against right of privacy lawsuits which allege wrongful publication of private facts, the writer and publisher who proceed once a source has revoked consent would be in legal difficulty if that consent can be as gratuitously revoked as it was given. The equitable principle of estoppel, however, seems applicable to this situation:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . .[42]

If, instead, the writer and publisher must turn to the justification or defense of newsworthiness, they can be placed in the position of having government, through its judicial branch, acting as ultimate editor, determining whether the allegedly private facts comport with a judge's definition or concept of appropriateness, according to that judge's personal reading of "the present state of community mores."

NOTES

[1]Restatement of Torts, Second, Section 652D.

[2]For a brief but informative update, see Katharine P. Darrow, "Times v. Sullivan--Twenty Years Later, the Celebration Is Muted," Presstime, March 1984, 12-13. The author is general counsel of the New York Times.

[3]Briscoe v. Reader's Digest Association, Inc., 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P. 2d 34, 57 A.L.R. 3d 1 (1974).

[4]Pember, Don R., Privacy and the Press, University of Washington Press, 1972, 40.

[5]Restatement of Torts, Second, id., Comment on Clause (a).

[6]57 A.L.R. 3d 16.

[7]Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939).

[8]Goldman v. Time, Inc., 336 F. Supp. 133 (1971).

[9]Blount v. T D Publishing Corp., 77 N.M. 384, 423 P. 2d 421 (1967).

[10]Briscoe v. Reader's Digest Association, Inc., supra; O'Hilderbrandt v. Columbia Broadcasting System, Inc., 40 Cal. App. 3d 323, 114 Cal. Rptr. 826 (1974); Forsher v. Bugliosi, 26 Cal. 3d 792, 163 Cal. Rptr. 628, 608 P. 2d 716 (1980); et al.

[11]Forsher v. Bugliosi, 163 Cal. Rptr. 628 at 639.

[12]Briscoe v. Reader's Digest Association, Inc., supra.

[13]Rawlins v. Hutchinson Publishing Co., 543 P. 2d 988 at 995.

[14]Restatement of Torts, Second, id., Comment k.

[15]Diaz v. Oakland Tribune, 9 Med. L. Rptr. 1121 (1983).

[16]Restatement of Torts, Second, Section 892.

[17]Id., Comment b; Section 892A (4) and (5), Comment i.

[18]527 F. 2d 1122 (1975); cert. den. 425 U.S. 998, 96 S. Ct. 2215 (1976); 424 F. Supp. 1286 (1976).

[19]Id., 527 F. 2d 1122, 1124.

[20]Id., 424 F. Supp. 1286, 1289.

[21]Neff v. Times, Inc., 406 F. Supp. 858 (1976); Campbell v. Seabury Press, 486 F. Supp. 298 (1979); In re Application of KSTP Television for Video Tapes in Case of United States of America, Plaintiff, v. Ming Sen Shiue, Defendant, 504 F. Supp. 360 (1980); Gilbert v. Medical Economics Co., 665 F. 2d 305 (1981); Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471 (1976); Howard v. Des Moines Register & Tribune Co., Dr. Roy C. Sloan and Margaret Engel, 283 N.W. 2d 289 (1979).

[22]Metropolitan Mortgage Fund v. Basiliko et ux., 415 A. 2d 582 (1980).

[23]Virgil v. Time, Inc., 527 F. 2d 1122, 1127.

[24]Id., 1127n.

[25]17 C.J.S. 747-748, Contracts, Section 71.

[26]Williston notes that Civil Law students select such technicalities as the insistence on consideration in English and American common law "for particular animadversion." Williston on Contracts, 618n.

[27]17 Am. Jur. 2d 430, Contracts, Section 89.

[28]Id.

[29]Id.

[30]Williston, 611.

[31]17 Am. Jur. 2d 430, Contracts, Section 89.

[32]Rerick v. Kern, 14 Serg. & R. 267.

[33]Williston, 616 ff.

[34]62 Am. Jur. 2d 707, Privacy, Section 20.

[35]113 La. 235, 62 So. 660.

[36]131 Wash. 86, 229 P. 317.

[37]57 A.L.R. 3d 16, 37.

[38]151 Misc. 692, 271 N.Y.S. 187 (1933).

[39]Id.

[40]Virgil v. Time, Inc., 424 F. Supp. 1286, 1288.

[41]E.g., Floyd Abrams and Alan U. Schwartz, "The Press, Privacy and the Constitution," New York Times Magazine, Aug. 21, 1977, 11, 13.

[42]Restatement of Contracts, Second, Section 90.